09-10139
(Panel: Judges Fletcher, Tallman and Rawlinson ,
Memorandum Decision: March 30, 2011)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. HOWARD WESLEY COTTERMAN, Defendant-Appellee.	NO. 09-10139 DC NO. 4:07-CR-01207-RCC-CRP

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLEE'S PETITION FOR REHEARING EN BANC

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I. INTRODUCTION AND COUNSEL'S STATEMENT

The defense respectfully asks this Court to grant *en banc* review in this, the first case ever to present a United States Court of Appeals the following question of exceptional national importance:

> May border officials, without reasonable suspicion that wrongdoing has occurred, seize household belongings of American citizens driving home from abroad and transport those possessions hundreds of miles from the border for days at a time, even though the examinations they wish to perform can be conducted at the border?

The panel majority's published Opinion answers that question "yes." Judge Fletcher's Dissent demonstrates why that answer is wrong.

This is a case of exceptional importance because it conflicts with precedent, and because it is of grave concern to all citizens traveling internationally, any of whom could be seriously impacted by such a seizure, which violates the Fourth Amendment. This ruling empowers border officials to arbitrarily seize any property, including possessions travelers depend upon personally and professionally. Allowing suspicionless seizure and removal of any property is a giant leap beyond this Court's decision in *U.S. v. Arnold*, 533 F.3d 1003 (9th Cir. 2008).[1] *See* Dissent n.3. The potential for delay and financial impact from possessory loss are alarming.

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[1] *Arnold* allows suspicionless searches of computers at the border. During an 18-month period between 2008 and 2010, some 3000 returning Americans were subjected to such searches. *See Kam-Almaz v. U.S.*, 96 Fed.Cl. 84, 86 (Fed.Cl. 2011) *citing New York Times*, November 15, 2010.

The Opinion conflicts with the precedent of this and other circuits in several important ways. For the first time in history, this Court has refused to apply either the "functional equivalent" or the "extended border" doctrines to a border search conducted far away from the border. The Opinion is also flawed by many errors of law and fact. Accordingly, *en banc* consideration is necessary to correct these errors, maintain uniformity of this Court's decisions, avoid conflict with the Supreme Court and the other circuits, and most importantly, to preserve the Fourth Amendment's protections for traveling American citizens, which the Opinion casts to the wind.

II. BACKGROUND

The published Opinion states the facts which, with a few critical exceptions (underlined below), are accurate. It recounts how, in April 2007, defendant Howard Cotterman and his wife, Maureen, driving home from vacation in Mexico, crossed the Arizona border at 10am. A computer notation advised the officers to search Howard's belongings because of a conviction from 15 years earlier. For two hours the officers scrutinized all of the Cottermans' belongings, including their computers and cameras, but found nothing noteworthy except one [2] password-protected file, which testimony showed to be commonplace. The Government has conceded that these facts did not amount to reasonable suspicion of wrongdoing,

[2] RT 8/27/08 at 91, 93.

which this panel affirmed as correct. Thus, the existence of reasonable suspicion is not at issue here.

Nevertheless, the Cottermans were detained at the port-of-entry all day.[3] Around noon, the border officers, reporting the absence of contraband to supervisory agents, were told to discontinue their search and await the supervisors' arrival. Before leaving, the supervisors had already decided to seize the Cottermans' possessions, whatever else happened so the agents could have released the Cottermans without their computers during the noon hour; they did not. Nor did they send their expert, Agent Owen, to the border, although his laptop was capable of performing any of the tests he eventually performed days later.[4]

The supervisors interrogated Howard and Maureen separately about 4:30pm, revealing nothing suspicious. Howard offered to help them access any computer files, but they declined. Instead, they seized the laptops, cameras, documents, and other items around sundown, and took them hundreds of miles away from the border. Owen analyzed Howard's computer two days[5] later, establishing

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[3] This detention lasted about 10 hours. *Cf. U.S. v. Flores-Montano*, 541 U.S. 149, 155 n.3 (2004) ("delays of one to two hours at international borders are to be expected").

[4] RT 8/27/08 at 79-80.

[5] RT 8/27/08 at 65-66.

reasonable suspicion in a matter of hours.[6] Six days later,[7] and without a warrant, Owen obtained enough evidence to indict.

Magistrate Judge Pyle found this seizure and the subsequent search to have violated the Fourth Amendment as an "extended border" search conducted without reasonable suspicion. On *de novo* review, District Judge Collins concurred and ordered the evidence suppressed. A divided panel of this Court has now reversed those findings, with the majority holding that the Government may seize a traveler's property without founded suspicion of illegality and take it far from the border, even though the search could be conducted at the border.

III. THIS RULING EMPOWERS BORDER OFFICIALS TO SEIZE AND HOLD YOUR POSSESSIONS INDEFINITELY FOR ANY REASON -- OR NO REASON.

The sweeping new seizure power created by the panel majority is based on the premise that what occurred was one continuous search at the border. But the search/seize/search pattern described above reveals the flaws in that premise. The first search of Cotterman property was conducted at the border and resulted in no reasonable suspicion after ten hours of detention. Agents then seized their property anyway. Only the second search of Howard's laptop, beginning two days later some 200 miles away disclosed contraband.

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[6] RT 8/27/08 at 78.

[7] *Id.*

The panel majority lumps the second search in with agents' power to conduct routine searches at the border by holding:

> So long as property has not been officially cleared for entry into the United States and remains in control of the Government, any further search is simply a continuation of the original border search – the entirety of which is justified by the Government's border search power.

Opinion 4225 (emphasis added). But this holding ignores that the Supreme Court has held suspicionless border searches to be *per se* "reasonable" only because they have "a history as old as the Fourth Amendment itself." *U.S. v. Ramsey*, 431 U.S. 606, 619 (1977). In contrast, seizures of travelers' possessions after a border search has revealed nothing amiss have no such pedigree, and therefore fall outside of that rationale, violating the Fourth Amendment.

Moreover, if continuous government control of an item *ipso facto* resolved the issue, this Court could have invoked that in cases such as *U.S. v. Sahanaja*, 430 F.3d 1049 (9th Cir. 2005) (search of package in U.S. postal service possession upheld as "extended border" search requiring reasonable suspicion, even though government had continuous control after package crossed border); and *U.S. v. Whiting*, 781 F.2d 692 (9th Cir. 1986) (same, item mailed out of the country). This Court did not do so, nor have the other circuits.

A. This holding erroneously conflates search power with seizure power.

The panel majority reasons that the second search, even though divorced from the search at the border by seizure and removal, somehow still remains "at the border" because the traveler has not regained a reasonable expectation of privacy. Opinion 4222. But that confuses privacy and possessory rights. The Fourth Amendment protects against both unreasonable searches and seizures, with seizures defined as "some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook County, Ill*, 506 U.S. 56, 61 (1992). Whether or not a seizure invades privacy rights, it always invades possessory rights. Taking from the Cottermans the kind of belongings that Americans depend upon and forcing them to travel on without them was most surely a "meaningful interference" with their possessory interests beyond the normal detention that is to be expected at a border.

The panel majority claims that a returning traveler "tacitly consents to search and seizure." Opinion 4229. That is untrue. All reasonable travelers expect to be searched at the border, but no traveler expects -- much less consents -- to having personal possessions seized after a thorough border search has disclosed nothing amiss. *Cf. U.S. v. Stewart*, 715 F.Supp.2d 750, 754 (E.D.Mich. 2010) (removal of laptop from port-of-entry may be "an intrusion greater than one might reasonably expect upon . . . re-entering the United States.").

Upholding a seizure where a search reveals no suspicion of wrongdoing

conflicts with *U.S. v. Cardona*, 769 F.2d 625 (9th Cir. 1985). There, this Court found officers to have been justified in searching a package in international mail, but affirmed suppression of checks photocopied during the search as an "illegal seizure" because the checks were not known to be contraband when they were copied. Similarly, the Supreme Court has been careful to predicate its assertions about the reasonableness of seizures upon some prior recognition of illegality or contraband. *See e.g.*, *U.S. v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971) (Approving seizure of materials discovered during search of returning traveler's luggage specifically because they were illegal). The seizure of previously-inspected belongings, where nothing unlawful was found, divorced the second search from the initial search at the border and was, itself, unreasonable. The panel ignores these points, even though Judge Fletcher explains them. Dissent 4235-36 and n.2.

The Opinion also wrongly claims that the Supreme Court has explicitly recognized that the Government "possesses inherent authority to seize property at the international border without suspicion" (n.9 emphasis added, *citing U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985), and *Flores-Montano, supra*). This is just false. *Montoya de Hernandez* briefly mentions seizure without "probable cause," but not without reasonable suspicion. Nor does *Flores-Montano* permit seizure without reasonable suspicion. The Opinion has misstated the law on

this vital point, upon which its precedent-shattering conclusion depends.

The Opinion also conflicts with *Kam-Almaz, supra*. There the Federal Claims Court explicitly found that property seizures at the border are unjustified absent "reasonable cause to suspect a violation of law." *96 Fed.Cl. at 89, citing* 19 C.F.R. §162.21. Border officials should not be granted seizure authority on a hunch or whim, hoping a more thorough search at a later date will "find something." *Cf. U.S. v. Price*, 472 F.2d 573, 575 (9th Cir. 1973).

B. Authorizing arbitrary seizure will assure arbitrary abuse.

The panel majority at 4210, 4225 claims to stop far short of countenancing "anything goes" or "carte blanche" at the border, and argues that it does not authorize "indefinite deprivations." The actual holding, however, encourages these things. The alleged safeguard to discourage abuse is that some court may determine after-the-fact whether a given seizure was so egregious in manner as to render it unreasonable. But since the holding (quoted on p.5, *supra*) requires no reason for agent actions to be given, no court can ever objectively determine reasonableness.

The Government can always claim it needs lengthy detention to allay every possible concern. As Judge Fletcher explains at 4238 and n.5, the list of potential "concerns" will inevitably be bottomless, thereby subjecting every traveler's belongings to potential seizure and indefinite detention. The breadth of this

holding -- which is cut adrift from specific case facts -- is astonishing.

The Opinion shrugs off considerations such as whether the desired search could have been conducted at the border, or whether the traveler offers to show the agents password-protected files. Instead it flatly empowers agents to seize whatever they want, thereby encouraging arbitrary and random seizures. There is not even a pretense here at crafting a jealously and carefully drawn exception. This broadest-of-possible holdings improperly and unnecessarily surrenders the very freedoms the Fourth Amendment was meant to protect.

C. Subjective logic and practicality are not substitutes for reasonable suspicion.

According to the panel majority no justification need ever be provided in future cases. Instead, only the use of subjective "logic," "practicality," and "common sense" is required for property to be seized and taken off-site for inspection. Opinion 4210, 4232. But "logic" or "practicality" cannot be assessed without justifying reasons. Any given act might be logical and practical if done for a valid reason, but entirely illogical and abusive if done for no reason -- or the wrong reason, as the facts of this case demonstrate.

Two agents traveling several hours to execute a pre-determined seizure that onsite officers could have done many hours earlier not only defies logic and common sense, but also defies "what is legal" and "desirable." Opinion n.10.

Instead, Owen could have gone to the border and discovered the contraband in several hours. (RT 8/27/08 at 63, 78-80.) The panel majority derides this alternative as "transporting the laboratory to the property." Opinion 4223. It is perfectly logical, however, given that the "laboratory" is simply Owen's laptop configured for field forensics. The "special equipment," purportedly needed to find contraband, is hyperbole without record support. Opinion 4210, 4219, 4222-23, 4225, 4229. Thus, common sense and logic did not require a seizure, nor are they a substitute for the constitutional objectivity of the reasonable suspicion standard.

The Opinion at 4224 implies that requiring reasonable suspicion for seizure would somehow cripple our border protection. This, again, is hyperbole. Reasonable suspicion is the lowest standard in the law and easy to meet. Indeed, the Supreme Court has sometimes considered it to pose too low a threshold to satisfy the Fourth Amendment.[8] Only by requiring this minimal threshold can our courts prevent our borders from becoming a Fourth-Amendment-free zone, where essential personal or business items may be seized at whim. Without an accountability mechanism -- not even the diminutive reasonable suspicion standard -- authorities will have the *carte blanche* that the panel majority eschews at 4225. *Cf. Beck v. Ohio*, 379 U.S. 89, 97 (1964) ("If subjective good faith alone were the

[8] *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 889 (1975) Douglass, J. concurring (such a low threshold permits authorities to "accost citizens at their whim.")

test, the protections of the Fourth Amendment would evaporate.").

Being subjected to unjustified inconvenience, indignity, and financial loss, is intolerable to international travelers, such as those carrying laptops and smart phones. This Opinion must be withdrawn and reasonable suspicion affirmed as a requirement before divesting American travelers of the belongings we all depend upon daily. *See Montoya de Hernandez*, 473 U.S. at 541("reasonable suspicion" standard is the tool that strikes the "needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause.")

IV. UNWARRANTED EXPANSION OF THE BORDER SEARCH EXCEPTION CREATES CONFLICTS OF EXCEPTIONAL IMPORTANCE.

The constitutional reasonableness of a search or seizure depends upon all the case-specific facts and circumstances to assess justification, scope, and manner. Multiple circuits, led by this Court and the Supreme Court, have, over many decades, embodied the reasonableness criteria pertaining to border searches in three comprehensive doctrines, discussed in §IVB below.

The seizure decision herein violated that body of law. The panel majority, finding no support in existing case law or the actual facts, ignored both and vastly expanded the Border Search Exception based on imagined scenarios. Our courts

have consistently condemned such "stealthy encroachment"[9] instigated by overzealous officers or permitted by judicial laxity. Unhampered by case law and facts, the panel has issued an unprecedented and unwarranted "sweeping approval of suspicionless border seizure and search of electronics equipment." Dissent n.1.

A. The Opinion focuses on agent demeanor, but ignores lack of justification.

"The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Montoya de Hernandez*, 473 U.S. at 537. "The majority fails, however, to substantively analyze the *nature* of the search itself." Dissent 4236.

Although the Opinion purports to review the seizure for "reasonableness," it fixates on "egregious" behavior rather than on reasonableness. Opinion 4210, 4217, and n.9. "Reasonableness" is determined by 1) the scope of the intrusion; 2) the manner of its conduct; and 3) the justification for its initiation. *E.g. Cardona*, 769 F.2d at 629. The Opinion focuses on only one of the three (manner) and only a minor aspect of that (demeanor).

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[9] *U.S. v. Page* 302 F.2d 81, 83 (9th Cir. 1962). *See also Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) ("the greatest dangers to liberty lurk in insidious encroachment by men of zeal.")

The absence of egregiously abusive behavior cannot be the sole test for reasonableness. Certainly, most reasonable travelers would prefer to be left in possession of their belongings by a surly border official than to have them seized by a polite one. Deprivation with no reason to suspect wrongdoing is no less "unreasonable" when done with a smile.[10]

The majority misrepresents the district court's conclusion at 4210 and 4232, ignoring the most significant findings. The district court actually concluded that the agents acted in "disregard of the Fourth Amendment" and "so presumptively" in following flawed department guidelines.[11]

Thus, the Majority abandoned reasonableness as the standard and ignored the most relevant aspects of manner, such as the predetermined seizure decision and the egregious intrusions.

B. Numerous errors and conflicts will wreak havoc if left standing.

The Supreme Court and circuit courts have, over many decades, developed a coherent and controlling set of three all-inclusive doctrines for searches involving

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[10] Even more shocking is that, if the traveler's property is damaged or destroyed while in government custody - tough luck - the Government need not compensate the traveler. *See Kam-Almaz, supra*.

[11] Appendix B, R&R, p.10.

border crossings whether they occur at the physical border, its functional equivalent, or away from either. Searches at a physical border crossing are *per se* reasonable by having occurred there. *Ramsey, supra*. "Border searches can also occur in places other than the actual physical border. Two different legal concepts authorize such searches: (1) searches at the functional equivalent of the border; and (2) extended border searches."[12] Both doctrines require that the searched entity crossed the border and remained unchanged since crossing. "Functional equivalent" of the border searches must occur at the first place where the entity comes to rest upon functionally entering the country, *e.g.*, airports. In contrast, "Extended border" searches occur after the first point where the entity might have been stopped, away in time and distance from either the border or its functional equivalent. Thus, the second search in this case, which occurred far from the border, fits only the Extended Border Doctrine.

The Extended Border Doctrine, established by this Court and adopted by other circuits to accommodate law enforcement needs to conduct searches away

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[12] Appendix C, §IIIA, Summary. Because a complete discussion of these doctrines is impossible here, we draw the defining principles from the Congressional Research Service article Protecting the U.S. Perimeter: Border Searches Under the Fourth Amendment (June 29, 2009) and the Annotation Validity of Warrantless Search under Extended Border Doctrine, 102 A.L.R. Fed. 269, impartial analyses of nearly 100 border search cases. See Appendix C §III for the pertinent excerpts.

from the border, provides the courts with the optimal tool to "ensure that the search is reasonable" and based on "statutory and constitutional authority." *U.S. v. Yang*, 286 F.3d 940, 946 (7th Cir. 2002). The Extended Border Doctrine respects "basic Fourth Amendment concepts by striking a sensible balance between the legitimate privacy interests of the individual and society's vital interest in the enforcement of customs laws." *U.S. v. Caicedo-Guarnizo*, 723 F.2d 1420, 1423 (9th Cir.1984). Astonishingly, the panel dismisses the district court's analysis under that doctrine as "far too rigid and simplistic." Opinion 4220. It is neither. It appropriately examined the totality of circumstances, including the unjustified agent actions, in keeping with the teaching of this Court, the Supreme Court, and the other circuits.

To reach its result, the panel majority misconstrues several key border search factors. For example, time and distance factors provide a primary means for differentiating among the three doctrines, contrary to the Opinion at 4220, 4221, 4224, 4230. *See Cardona, supra* at 628-29. The Opinion also conflicts with precedent in claiming that "Customs clearance" or "continuous control" are determining factors. The cases discussing continuous control do so only to satisfy the common requirement of all border searches that the property remain "unchanged since crossing" the border. *See e.g., Sahanaja, supra*, at 1054. Moreover, contrary to the published Opinion at 4217 n.8, "evasive entry" is not

required by the Extended Border Doctrine. *E.g., Caicedo-Guarnizo, supra. See* 102 A.L.R. Fed. 269, *supra* n.12. If allowed to stand, these errors and conflicts will set border search jurisprudence back decades.

C. In conflict with Supreme Court precedent, the ruling replaces key facts and circumstances with hypotheticals.

The Opinion disregards key facts, such as Howard's offer to provide file access, and that the search was practicable at the border, dismissing these case-specific reasonableness factors as "constitutionally irrelevant." Opinion 4212, 4228, and n.16. That is as irrational as it would be to contend that the reasonableness of seizing a locked suitcase should be analyzed without considering the owner's offer of the key. These factors certainly militated against the constitutional reasonableness of this seizure.

Nor does this case involve a situation in which a search at the border would be impracticable, despite the panel majority's imagined scenarios to the contrary. Opinion 4229, 4233. Thus, one of the ruling's fundamental premises, that "complexity" justified the seizure, is inapplicable here and strictly hypothetical.

The Opinion at 4228 distinguishes the cases cited by the district court and defense, including *Arnold* and *U.S. v. Romm*, 455 F.3d 990 (9th Cir. 2006), as involving "quick and easy discoveries." But the search situations presented by

Arnold and *Romm* are similar to those in the case at bar. The authorities in those cases, however, examined unallocated disk space at the port-of-entry to discover contraband[13] as they could have done here "in a matter of hours" (a fact fully supported by the record). Opinion 4213.

Thus, the panel majority has ignored the record and relied on numerous suppositions, violating the principle that this Court should base its holdings on the actual facts, rather than engaging in the kind of "hypothetical jurisprudence," that the panel itself eschews in its own Opinion at n.13.

D. Treating the Extended Border Doctrine as a mere suggestion, the panel majority unnecessarily creates a new doctrine.

The panel majority refused to apply the Extended Border Doctrine, despite the fact that the second search fits only that doctrine. As this Court has ruled, if a search conducted away from the actual border "is to be upheld, it must either have been conducted at the functional equivalent of the border or have constituted a valid extended border search." *Cardona*, 769 F.2d at 628. Therefore, since the second search could have been conducted at the actual border, but was instead conducted after that point, only the Extended Border Doctrine applies, just as the district court held.

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[13] Tests that are practicable at the border are exemplified in *Romm*.

The majority nevertheless sweeps aside that body of case law for the first time in history, unnecessarily inventing a completely new doctrine for personal possessions that border officials decide to seize without articulable suspicion. The ruling is unprecedented, unwise, and unconstitutional. *En banc* scrutiny is needed to preserve the precedent and principles that our courts have consistently applied nationally for decades.

V. The panel majority's decision abandons our liberties for no real gain.

Finally, this Opinion rests on the flawed premise that it will somehow strengthen our national security to allow border officials to seize travelers' electronics at whim for forensic analysis. On the contrary, however, easily-obtainable encryption software can now prevent file access, even in a forensic laboratory. *See In re Boucher*, 2009 WL 424718 (D.Vt. 2009) at 2. Boucher's files had been encrypted with commonly-available software, for which decryption takes years, even with full laboratory resources. Thus, those with something to hide will easily be able to defeat this new rule.

Furthermore, the panel majority attempts to rationalize suspicionless seizures by the outlandish claim (erroneously attributed to the defense) that the district court's outcome requires computer forensic labs at every port-of-entry.

Opinion 4210, 4222-23. This wild speculation is fallacy. As *Boucher* demonstrates, labs at the border are not a solution to anything and will prove increasingly ineffective. As a practical matter, requiring a traveler to cooperate by providing unencrypted data or passwords is the only way to ensure timely access to encrypted data.[14] Yet the published Opinion rejects this logical solution. By allowing travelers' belongings to be seized for no reason the Opinion has blown a gaping hole in the Fourth Amendment, selling our priceless liberties for a song.

VI. CONCLUSION

The Executive Branch has made a bid for unrestricted power to seize property of American citizens by exploiting the Border Search Exception. The panel majority has acquiesced to that power grab, and in the process nullified a vast swath of the Fourth Amendment and trampled on long-established precedent. These issues of great, long-term importance to business and ordinary citizens require *en banc* review to protect the constitutional rights of all travelers.

/s/ William J. Kirchner
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[14] The responsible federal agencies, including the National Institute of Standards and Technology, the Government's own technical authority, have all weighed in on this issue. See Appendix C, §IIC, §IID.

VII. CERTIFICATE OF COMPLIANCE

Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Petition for Rehearing En Banc is: (check applicable option)

XXX Proportionately spaced, has a typeface of 14 points or more and contains 4188 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ William J. Kirchner

WILLIAM J. KIRCHNER,
Attorney for Howard W. Cotterman

VIII. CERTIFICATE OF FILING AND SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2011, I electronically filed the Appellee's Petition for Rehearing *En Banc* and the Appendix thereto with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Both participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ *William J. Kirchner*

William J. Kirchner
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No. 09-10139

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HOWARD WESLEY COTTERMAN,
Defendant-Appellee.

On Appeal from the United States District Court
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The Honorable Raner C. Collins
District Court Case No. 4:07-cr-01207-RCC-CRP-1

BRIEF *AMICUS CURIAE* OF THE CONSTITUTION PROJECT IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amicus* makes the following disclosure statement:

The Constitution Project is a not-for-profit organization. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

/s/ Christopher T. Handman
Christopher T. Handman

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Constitution Project (Project) is an independent, bipartisan organization that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. It has appeared regularly before federal courts in cases raising important constitutional questions. *See, e.g.*, *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074 (2011); *General Dynamics Corp.* v. *United States*, 131 S. Ct. 1900 (2011).

After September 11, 2001, the Project created its Liberty and Security Committee, which comprises members of the law enforcement community, legal academics, former government officials, and advocates from across the political spectrum, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. This Committee has recently published a report addressing the very issue currently pending before this Court. In May 2011, the Committee released *Suspicionless Border Searches of Electronic Devices: Legal and Privacy Concerns with The Department of Homeland*

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amicus* certifies that all parties have consented to the filing of this brief. *Amicus* likewise certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

Security's Policy, in which its signatories urged the Department of Homeland Security (DHS) to discontinue its policy of searching electronic devices at the border without reasonable suspicion. It explained that such searches "contravene well-established Fourth Amendment principles," "have a chilling effect on free speech," and "can open avenues for other constitutional abuses, such as racial or religious profiling."[2]

This is precisely the type of search that was conducted in the present matter. Accordingly, the Project files this brief in support of Appellee to urge the Court to rehear the case *en banc* because it raises important questions about the scope of the Fourth Amendment's protection of individuals' computers and similar electronic devices at the border.

INTRODUCTION

This Court, sitting *en banc*, has refused to endorse the limitless rule that "at the border, anything goes." *United States* v. *Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008) (en banc). But the divided panel in *United States* v. *Cotterman*, 637 F.3d 1068 (9th Cir. 2011), has turned around and done just that. Its holding—that a laptop may be subject to seizure for two days and then transported over 170 miles

[2] Liberty & Sec. Comm., The Constitution Project, *Suspicionless Border Searches of Electronic Devices: Legal and Privacy Concerns with The Department of Homeland Security's Policy* 2 (2011) (hereinafter Project Report), *available at* http://www.constitutionproject.org/pdf/Border_Search_of_Electronic_Devices_0518_2011.pdf.

merely because it was searched initially at the border—essentially allows the traditionally narrow border exception to eviscerate entirely the protections of the Fourth Amendment. Although noting in passing the principle that there must be some ascertainable limits to the manner in which a border search may be performed, *see id.* at 1070, 1079, the majority failed to put this principle into practice. Instead, its ruling allows border officials to detain personal property and remove that property from the border into the interior, so that the officials may "fully allay [their] concerns that [the property] contained contraband." *Id.* at 1077. This contravenes fundamental Fourth Amendment principles, which require that any search or seizure be *reasonable*.

What is reasonable necessarily depends on the circumstances of the particular search or seizure at issue. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985). But the majority gave short shrift to the relevant circumstances in *Cotterman* and relied on dated precedent that does not embrace the challenges of the rapidly changing digital age. As a result, the majority fundamentally misunderstood the privacy interests at stake and failed to fully appreciate the nature of electronic media: it is qualitatively different from anything else. Both the *type* of information that we regularly carry around with us on our laptops and cell phones and the *volume* of that data is unique and historically unparalleled. In this regard, a laptop is different from a vehicle, a piece

of luggage, or a mailed letter—the sorts of items that customarily were at issue when the border exception was first formulated by the courts. Electronic devices that store binary digital information—totaling billions of pages if physically printed out—are fundamentally different. The law therefore needs to catch up with advances in technology in order to bring the Fourth Amendment into the modern era and in order to define what is a reasonable search or seizure in the digital age.

If left standing, the ramifications of the *Cotterman* majority's holding are enormous. Between October 1, 2008 and June 2, 2010 alone, over 6,500 people were subjected to searches of their electronic media at the border. Project Report 1.[3] Nearly half of these people were United States citizens. *Id.* Countless more regularly carry their cell phones, laptops, handheld devices, and other electronic media on international travel everyday. According to the panel majority, however, a border official, *for no reason whatsoever*, may review all data collected in that media, hold the device for multiple days, and send it hundreds of miles away for further analysis. An official could, for example, seize an MP3 player from a college student returning from study abroad simply to ensure that all the songs stored on the device were downloaded legally (even if they had all been downloaded *in this country*). This has nothing to do with protecting the integrity

[3] The Project drew this information from the ACLU's analysis of data obtained from the government through FOIA.

of our border. Such a gross expansion of the border search exception warrants rehearing *en banc*. Accordingly, this Court should rehear the case *en banc* in order to resolve questions of exceptional importance, to ensure that the border search doctrine does not become the exception that swallows the rule, and to recognize the heightened privacy interests that are implicated in the search or seizure of electronic storage devices.

ARGUMENT

I. THE PANEL MAJORITY'S RULE RAISES A QUESTION OF EXCEPTIONAL AND RECURRING IMPORTANCE IN THE DIGITAL ERA.

1. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. To that end, a search conducted without a warrant is "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (footnote omitted); *accord Flippo* v. *West Virginia*, 528 U.S. 11, 13 (1999); *Thompson* v. *Louisiana*, 469 U.S. 17, 21 (1984). The border search doctrine is one such exception. *United States* v. *Ramsey*, 431 U.S. 606, 621 (1977); *Seljan*, 547 F.3d at 999. It is justified by "the Government's paramount interest in protecting the border." *United States* v. *Flores-Montano*, 541 U.S. 149, 155 (2004).

But the fact that the warrant requirement is suspended at the border does not mean that "anything goes." *See Seljan*, 547 F.3d at 1000. A border agent's search authority is "subject to substantive limitations imposed by the Constitution." *Ramsey*, 431 U.S. at 620. Specifically, "[b]alanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent." *Montoya de Hernandez*, 473 U.S. at 539. And although "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border," *id.* at 540, the individual's rights are not rendered nugatory.

Given that the border search exception is just that—an exception—it has been described repeatedly by this Court as "narrow." *See, e.g.*, *Seljan*, 547 F.3d at 999; *United States* v. *Sutter*, 340 F.3d 1022, 1025 (9th Cir. 2003); *United States* v. *Abbouchi*, 502 F.3d 850, 854 (9th Cir. 2007). The majority's ruling, however, substantially expands the scope of the exception, allowing for the search, seizure, and transport of property *hundreds of miles* beyond the border, *without any suspicion* of a security threat or the existence of any type of contraband. As explained below, this goes far beyond the reasons justifying the existence of the exception, and is anything but "narrow."

2. Both the *nature* of the information and the *volume* of that information—some of it totally unknown to its user—make electronic devices such as laptops

entitled to greater privacy protections to preserve the historically narrow scope of the border exception. Most of us keep highly personal information on electronic devices, which we carry with us everyday and on travel, within this country and without. As the Project explained in its Report, historically "[a]s a practical matter, most private documents, letters, photographs, and other personal effects would remain in an individual's home, safeguarded by full Fourth Amendment protections and the warrant requirement. With today's technology, however, people can and do travel with vast quantities of private, personal information stored on their laptops and other electronic devices." Project Report 2. DHS has even recognized as much, describing the "central privacy concern" of border searches of electronic devices as "the sheer volume and range of types of information available on electronic devices as opposed to a more traditional briefcase or backpack." DHS, *Privacy Impact Assessment for the Border Searches of Electronic Devices* 2 (2009). "Where someone may not feel that the inspection of a briefcase would raise significant privacy concerns because the volume of information to be searched is not great, that same person may feel that a search of their laptop increases the possibility of privacy risks due to the vast amount of information potentially available on electronic devices." *Id.*

DHS appropriately described the privacy concerns raised by the border search of electronic devices as "unique." *Id.* at 3. A person who would never

carry abroad hard copies of legal documents, personal pictures, or private writings may nevertheless transport electronic versions of these items across the border—possibly without being fully aware of doing so—merely by traveling with a laptop. Or a person who would never voluntarily subject to governmental inspection his or her medical appointments, confidential business e-mails, or other such sensitive data—may do so inadvertently by carrying a Blackberry or iPhone abroad. Even someone who has made efforts to protect his or her privacy by deleting material before traveling is vulnerable: that data may still be mined by border agents using forensic software. Those with less computer savvy likely have no idea that when traveling with their laptops, they are carrying around their full web browsing histories. As the Project reported: "Computers * * * store * * * information on web sites visited. This can include cookies and other metadata that the individual does not even know exists on his or her computer and can cover a period of several years." Project Report 7. The *nature* of this stored information is highly personal and makes it deserving of unique protections—on par with those for searches of a person.

The sheer volume of data stored in electronic format is staggering. A 2003 study issued by the University of California, Berkeley School of Information

reported that, in 2002, the world produced 5 *exabytes*[4] of new information, 92% of which was stored on magnetic media (i.e., hard drives). Berkeley School of Information, *How Much Information? 2003* at 1 (2003) (hereinafter Berkeley Study). Only 0.01% of that data was stored in hard copy. *Id.* To put this in some perspective,[5] 5 exabytes divided by a world population of 6.3 billion in 2002 equals 800 megabytes of recorded information per person for that year. *Id.* at 2. It would take *30 feet of books* to represent the equivalent of 800 megabytes of data on paper. *Id.*

The average American, of course, has far more data stored on electronic devices. The United States alone produces 50% of all information stored on magnetic media. *Id.* To use a popular example—currently available iPods hold between 2 and 160 gigabytes of data. Apple, *iPod Classic: Technical Specifications*, http://www.apple.com/ipodclassic/specs.html (last visited Sept. 8, 2011). Just one gigabyte of data is equivalent to *an entire pickup truck* filled with books. Berkeley Study 3.

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[4] One exabyte is 10^{18} bytes—i.e., one quintillion (1,000,000,000,000,000,000) bytes.

[5] Of course, the Berkeley Study relied on data that is now almost 10 years old. To give some indication of current numbers, at least between 1999 and 2002, new stored information grew at a rate of approximately 30% per year. Berkeley Study 2.

The important point is that electronic storage devices bear little resemblance to their analog cousins like briefcases and backpacks. And any Fourth Amendment rule that categorically dismisses those differences is just an anachronism that undermines the Fourth Amendment as well as the narrow border exception rule itself. After all, it is almost impossible to draw any realistic comparison between transporting vehicles or luggage with the transportation of a laptop. The amount of information contained in a computerized device simply was unfathomable at the time the border search exception was conceived. Rehearing is warranted to bring the border exception rule into alignment with modern technology and American ways of life.

3. The Supreme Court has recognized that certain heightened privacy interests warrant greater protection at the border. *See Flores-Montana*, 541 U.S. at 152. The Court spoke in terms of "highly intrusive searches of the person" and noted that such "dignity and privacy interests of the person being searched[ ]simply do not carry over to vehicles" subjected to search at the border. *Id.* But the Court did not, as the panel majority suggests, preclude a finding that a person could ever have such a heightened interest in property. *See Cotterman*, 637 F.3d at 1080 & n.14.

In concluding that privacy concerns in property are *never* relevant at the border, the majority relied on the decision of a prior panel, *United States* v. *Arnold*,

533 F.3d 1003 (9th Cir. 2008), which concluded that "[t]he Supreme Court's analysis [in *Flores-Montano*] determining what protection to give a vehicle was not based on the unique characteristics of vehicles with respect to other property, but was based on the fact that a vehicle, *as a piece of property*, simply does not implicate the same 'dignity and privacy' concerns as 'highly intrusive searches of the person.' " *Arnold*, 533 F.3d at 1008 (emphasis added) (quoting *Flores-Montano*, 541 U.S. at 152). The Supreme Court did not go that far, however. It did *not* hold that a vehicle was subject to less protection *because it was property*; it merely held that the dignity and privacy concerns implicated in searches of persons did not apply to searches of *vehicles*. *See Flores-Montano*, 541 U.S. at 152. Both the panel majority and the panel in *Arnold* therefore relied on a misinterpretation of the Supreme Court's holding. That divergence with binding Supreme Court authority warrants rehearing by this Court.

Moreover, this misinterpretation led to the panel majority's conclusion that the search of a laptop at the border did not require reasonable suspicion because it was no different than the search of a vehicle or luggage. *See Cotterman*, 637 F.3d at 1080 (citing *Arnold*, 533 F.3d at 1008). The majority relied again on *Arnold*, where the prior panel had reasoned in relevant part that "case law does not support a finding that a search which occurs in an otherwise ordinary manner, is 'particularly offensive' simply due to the storage capacity of the object being

searched." 533 F.3d at 1010. But this analysis grossly oversimplifies the issue. And where *Arnold* misconceived this issue, the panel majority ignored it entirely.

II. REHEARING IS FURTHER WARRANTED BECAUSE IT OFFENDS BASIC FOURTH AMENDMENT LAW TO LET THE GOVERNMENT SEIZE AN INDIVIDUAL'S ELECTRONIC DEVICE WITHOUT SUSPICION MERELY TO CONDUCT A FORENSIC SEARCH OF THE DEVICE.

1. The panel majority found "no basis under the law to distinguish the border search power merely because logic and practicality require some property presented for entry—and not yet admitted or released from the sovereign's control—to be transported to a secondary site for adequate inspection." 637 F.3d at 1070. The search in this case had begun at the border, but had ended "two days later in a Government forensic computer laboratory almost 170 miles away." *Id.* The Government has not (and could not reasonably have) argued that its laboratory is the functional equivalent of the border. And it has not argued on appeal that there was "reasonable particularized suspicion of criminal activity to support the search under the extended border search doctrine." *Id.* at 1074 (footnote omitted). This means that, in order to be valid, the search must fall within the standard border search exception.

The border search exception to the warrant requirement of the Fourth Amendment is defined specifically in reference to a place—*the border*. Thus, even in *Arnold*, the panel expressly limited its ruling to searches actually at the border;

the panel did not suggest any search beyond the border would be constitutional. *See* 533 F.3d at 1008 ("reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices *at the border*") (emphasis added). Not surprisingly, the exception is almost universally described as applying only to searches and seizures taking place *at the border*. *See, e.g.*, *Flores-Montano*, 541 U.S. at 155 ("the Government's authority to conduct suspicionless inspections at the border"); *Montoya de Hernandez*, 473 U.S. at 537 ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border"); *Ramsey*, 431 U.S. at 616 ("searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border").

Of course, there is a commonsense expansion of the border search doctrine to places that constitute the "functional equivalent" of the border. *See Abbouchi*, 502 F.3d at 855. But this does not mean that any search or seizure somehow tangentially related to the border is *per se* reasonable. Rather, this Court has long recognized that where a search or seizure takes place beyond the border, additional protections kick in, such as the requirement that there be reasonable suspicion. *See, e.g.*, *United States* v. *Caicedo-Guarnizo*, 723 F.2d 1420, 1422 (9th Cir. 1984) (describing the extended border doctrine).

2. But the panel majority has expanded the border search doctrine well beyond the border, without also imposing the additional protections this Court has concluded are necessary to such an expansion. *See id.* The majority reasoned that it would not apply the "rigid and simplistic" rule that "relies on the simple physical act of moving beyond the border" to require greater suspicion. *Cotterman*, 637 F.3d at 1076. But its analysis conflated the border search doctrine, the functionally equivalent border doctrine, and the extended border search doctrine—thus minimizing the importance of the role of the actual physical border. For example, the majority relied on *Abbouchi* to criticize the district court for using "a 'comparison of absolute time and spatial differences alone'[ ]to distinguish the border search doctrine." *Id.* at 1076 (quoting *Abbouchi*, 502 F.3d at 855). The majority then essentially discounted these considerations entirely, concluding that "we will not confuse a search authorized by the border search power with an extended border search simply because the property was removed from the border." *Id.* at 1078-79 (citing *Abbouchi*).

That gets things backwards. The quoted language from *Abbouchi* concerned the difference "between a search at the border's functional equivalent and an extended border search." *Abbouchi*, 502 F.3d at 855. And although the *Abbouchi* court did conclude that "comparison of absolute time and spatial differences alone is not enough to distinguish" the two—what it listed as an additional consideration

is telling. *Id.* The court continued: "Rather, we also look to whether the search * * * occurred at the last practicable opportunity before its passage over the international border." *Id.* Thus, far from being irrelevant, the additional factor that the *Abbouchi* court considered was directly related to the *place* of the search. And because the issue was whether the search occurred at the functional equivalent of the border, the additional factor related to the *function* of the location. But here is the important part—the functionally equivalent border doctrine is *not* implicated in the present case. The additional factor considered by the court in *Abbouchi* is therefore irrelevant here. What remains is the *temporal and spatial differences* to determine whether the search falls under the border search doctrine or the extended border search doctrine.

This is one of those cases where the answer is really as simple as it seems: The search did not take place at the border—far from it. Cotterman's laptop was transported to a government laboratory 170 miles away from the border for a more comprehensive examination. *Cotterman*, 637 F.3d at 1070. Not even the most generous reading of the phrase "at the border" includes a location so remote from the actual border. The majority nevertheless found that "the border" may extend hundreds of miles into the interior of this country due to "reason and practicality." *Id.* at 1076. Because this analysis was untethered to the very place that justifies the

exception to the warrant requirement of the Fourth Amendment—the border—it is fundamentally flawed.

3. The majority concluded that it "furthers no constitutional purpose" to require "the Government to demonstrate a higher level of suspicion before it may transport property to conduct more thorough and efficient searches." *Id.* at 1078. But the majority failed to recognize that the Government's interest in protecting its borders (as opposed to enforcing the law domestically) becomes far more attenuated once a person or property leaves the border. *See Caicedo-Guarnizo*, 723 F.2d at 1423. It also failed entirely to connect its analysis concerning the *manner* of the search to precedent explaining that a suspicionless search may be deemed unreasonable because of the particularly offensive manner in which in which it was carried out.

In *Seljan*, this Court observed, "*Ramsey* suggested that a border search might be unreasonable 'because of the particularly offensive manner in which it is carried out,' citing as examples searches that were held unreasonable in *Kremen* v. *United States*, 353 U.S. 346 (1957) (officers, without a search warrant, seized the entire contents of a cabin and took the items 200 miles away to be examined) * * * ." 547 F.3d at 1002 (parallel citation omitted). Thus, the *en banc* Court, as well as the Supreme Court, has recognized that the seizure and transportation of property over hundreds of miles *is* constitutionally significant. It renders the search (and

seizure) unreasonable. *See id.* The majority's failure even to *acknowledge* the constitutional significance of the transportation of the laptop away from the border thus renders its decision contrary to binding precedent.

III. REHEARING IS WARRANTED TO ENSURE THAT SEARCHES INVOLVING PERSONAL ELECTRONIC DEVICES AT THE BORDER ARE NOT CONDUCTED ARBITRARILY.

The panel majority's opinion is flawed in yet another way: It fails to impose any meaningful limits on the Government's authority to search the contents of personal information stored in computerized electronic devices, or to seize and transport personal property away from the border. Instead, the majority concluded that it would "continue to analyze the Government's conduct on a case-by-case basis to determine whether searches or seizures are effectuated in such a manner as to render them unreasonable." *Cotterman*, 637 F.3d at 1079. But this is exactly the type of *ad hoc*, amorphous approach to the border search doctrine that the Supreme Court rejected in *Flores-Montano*. *See* 541 U.S. at 152. Exceptions to the warrant requirement of the Fourth Amendment instead must be "narrow" and "well-delineated." *See Flippo*, 528 U.S. at 13; *Thompson*, 469 U.S. at 21. The majority's formulation of the border search exception is anything but.

As explained above, the invasion of privacy and dignity concerns that occurs when an electronic device such as a laptop or cell phone is searched demands a more meaningful and predictable degree of protection. Absent such protection, the

search and seizure of these unique items is bound to be arbitrary, is in danger of being based on impermissible considerations such as racial or religious profiling, and may even have a chilling effect on free speech. *See* Project Report 2, 6-7. In order to avoid these abuses, the Project submits that the Court should maintain the balance struck by the extended border search exception: it should require, at minimum, reasonable suspicion before a border agent may either search the contents of an electronic storage device or transport any type of personal property away from the border (or its functional equivalent) for further examination. Such a standard would both protect the individual's concerns of privacy and also would make searches at the border more effective tools for law enforcement by "focus[ing] limited law enforcement resources where they can be most effective. *See* Project Report 10. In addition, the Project respectfully submits that, if law enforcement wished to detain an electronic storage device for more than 24 hours, or copy data from that device, probable cause should be required. *Id.* at 9.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(5), (a)(6), and (a)(7) of the Federal Rules of Appellate Procedure, as well as Circuit Rule 29-2(c)(2), I hereby certify that this brief was produced in Times New Roman 14-point typeface using Microsoft Word 2003 and contains 4,199 words.

/s/ Christopher T. Handman
Christopher T. Handman

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2011, the foregoing Brief for Amicus Curiae was filed with the Court's ECF system, and accordingly was served electronically on all parties.

/s/ Christopher T. Handman
Christopher T. Handman

C.A. No. 09-10139
Published Opinion Filed March 30, 2011
(Tallman, Rawlinson, JJ.; B. Fletcher, J., dissenting)

D. Ct. No. CR 07-01207-TUC-RCC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HOWARD WESLEY COTTERMAN,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

RESPONSE TO PETITION FOR REHEARING EN BANC

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III. STATEMENT OF COUNSEL

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, the United States hereby responds to the defendant's petition for en banc rehearing. En banc rehearing is not warranted in this case because the panel's decision is consistent with Ninth Circuit and Supreme Court precedent and was correctly decided. The panel properly reversed and remanded the district court's decision and did not overlook or misapprehend any point of law. Rehearing is unwarranted and unnecessary, and the defendant's petition should be denied.

IV. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

On June 27, 2007, a Tucson, Arizona grand jury charged the defendant in an indictment with various child pornography offenses. (ER 264-69.) He was charged with: two counts of production of child pornography, in violation of 18 U.S.C. §§ 2251(a),(e) and 2256(2); transportation and shipping, receipt, and possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B), (b)(2) and 2256(2); importation and transportation of obscene material, in violation of 18 U.S.C. §§ 1462(a), 1465, 2252(a)(1),(2) and (b)(1); and flight to avoid prosecution, in violation of 18 U.S.C. § 1073. (ER 264-69.)

Significant portions of the evidence were obtained through a search of the defendant's laptop computer that was seized at the Lukeville, Arizona Port of Entry (POE) at the U.S./Mexico border. The defendant filed a motion to suppress evidence seized from his computer. (ER 252-63.) After hearing evidence and argument, the district court granted the defendant's motion to suppress, finding that the search was an "extended border" search that required reasonable suspicion, and that reasonable suspicion was lacking here. (ER 3-16, 1-2.) With Solicitor General approval, the government appealed. On March 30, 2011, this Court reversed and remanded, holding that the district court erred in suppressing the evidence that was lawfully obtained during a border search. *United States v. Cotterman*, 637 F.3d 1068, 1083 (9th Cir. 2011).

B. Statement of Facts[1]

The published opinion accurately states the facts of this case. A brief review of the facts shows that on Friday, April 6, 2007, the defendant and his wife applied for admission into the United States from Mexico at the Lukeville POE in Arizona. (ER 3.) Customs and Border Protection (CBP) officers referred the Cottermans to secondary inspection based on information they received from an intelligence unit

[1] The government incorporates all facts and argument set forth in its prior appellate briefs and filings.

that targets convicted and registered sex offenders who travel abroad regularly. (ER 64-65.) While at secondary inspection, record checks confirmed that the defendant was convicted in 1992 in California state court on two counts of use of a minor in sexual conduct, two counts of lewd and lascivious conduct upon a child, and three counts of "child molest-inhabited dwelling." (ER 249-51.) The secondary inspection revealed that the defendant and his wife possessed, among other things, a digital camera and two laptop computers. (ER 4.) A preliminary search of one of the laptops by CBP Officer Alvarado revealed some password-protected files. (ER 4.)

The defendant and his wife left the Lukeville POE late in the afternoon on April 6, 2007. (ER 4.) The camera and laptops were retained for forensic examinations (ER 4), and Acting Resident Agent in Charge Craig Brisbine transported the items from the Lukeville POE to the Immigration and Customs Enforcement (ICE) Office in Tucson (ER 70). Brisbine delivered the items to computer forensic examiner John Owen at the ICE office in Tucson at approximately 10:00 p.m. that same night. (*Id.*) Owen checked the items into evidence and began his forensic examination the next day, Saturday, April 7th. (*Id.*)

Over the course of the weekend, there was repeated telephonic contact between ICE agents and the Cottermans about the status of the examinations. (ER 71-73.) On Saturday, the forensic examination of the camera was completed with negative

results. The Cottermans responded to the ICE office in Tucson on Saturday afternoon and took possession of the digital camera.

On Sunday, April 8th, the forensic examination of the laptop computer belonging to the defendant resulted in the discovery of approximately 75 child pornographic images in unallocated clusters. (ER 4.) There were also numerous password-protected .zip files in folders on that same hard drive. ICE agents contacted the defendant on his cell phone and asked him to come to the ICE office the next day, Monday, April 9th, to assist the forensics examiner in completing the examination and to return his laptop to him. (App's Op. Br. 8.) The defendant agreed to come to the office; however, on Monday, he instead boarded an Aeromexico flight from Tucson to Hermosillo, Mexico, with a final destination of Australia. (ER 75.)

On April 11, 2007, Owen was able to access the 23 password protected .zip files on Cotterman's computer. He found approximately 378 images and eleven video files of child pornography. (*Id.*) Approximately 360 of the 378 images of child pornography and all eleven videos depicted the same nude or partially nude female, approximately seven to ten years old, engaged in various sexual acts. (*Id.*) In a number of the images, an older man, who appeared to be the defendant, was touching and manipulating the minor female's genitals and pubic area. Further analysis revealed the presence of an additional 1206 images of child pornography on the same

hard drive, as well as approximately 309 stories of sexual abuse and acts of incest involving minors. (Op. Br. 9.) On April 25, 2007, law enforcement authorities identified and interviewed the minor female victim. (Op. Br. 10.)

On September 8, 2007, Australian law enforcement authorities arrested the defendant in Australia, pursuant to a United States provisional arrest warrant. (Op. Br. 11.) The defendant was then extradited to Arizona.[2]

C. Ninth Circuit's Panel Decision

In a published opinion, the majority (J. Tallman; J. Rawlinson) reversed and remanded, holding that the district court erred in suppressing the evidence lawfully obtained from the defendant's laptop computer during a border search. The majority rejected the notion that reasonable suspicion is required to continue a search, initiated

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[2] The defendant alleges that the panel opinion contained factual errors. Specifically, he asserts that: (1) more than one password protected file was found on Cotterman's laptop at the POE; and (2) that ICE forensic examiner Agent Owen did not have a laptop that was capable of performing the forensic examination. (Pet. 2-3.) Not only are factual disputes insufficient to justify en banc review, Fed. R. App. P. 35, but these facts were correctly reflected in the panel's opinion. First, the opinion notes that "many of Cotterman's files were password protected," *Cotterman*, 637 F.3d at 1071, a fact expressed in the magistrate's report and recommendation and not altered in the district court's order (ER 1-2, 4). Second, the majority correctly states the capability of Owen's laptop, yet finds that it is not constitutionally relevant to the analysis of the case. *Cotterman*, 637 F.3d at 1082 n.16. Finally, the defendant's various other factual claims are incorrect (Pet. 3-4); the panel correctly stated that Agent Owen began examining the defendant's laptop on Sunday. *Cotterman*, 637 F.3d at 1072.

at the border, to a secondary site. *Cotterman*, 637 F.3d at 1079, 1083. It concluded that, so long as the property has not been cleared for entry into the United States and remains in the control of the government, "any further search is simply a continuation of the original border search – the entirety of which is justified by the Government's border search power." *Id.* at 1079. The dissenting judge (J. B. Fletcher) would have affirmed. The defendant filed a petition for en banc (not panel) rehearing. On September 23, 2011, this Court ordered the government to respond to the petition.

V. ARGUMENT

A. THE DEFENDANT'S EN BANC PETITION SHOULD BE DENIED BECAUSE THE PANEL OPINION IS CONSISTENT WITH SUPREME COURT AND CIRCUIT PRECEDENT.

En banc review is not warranted under Fed. R. App. P. 35, particularly because the panel's opinion is consistent with all relevant Ninth Circuit and Supreme Court precedent. *See Cotterman*, 637 F.3d at 1074-84 (citing Supreme Court and Ninth Circuit authority). Because the opinion does not conflict with any decisions of the Supreme Court and this Court, the defendant's en banc petition should be denied.

The defendant argues that the panel opinion conflicts with circuit and Supreme Court precedent because it upholds "a seizure where a search reveals no suspicion of wrongdoing . . . ." (Pet. 6-7.) He asserts that the opinion conflicts with *United States*

v. Cardona, 769 F.2d 625 (9th Cir. 1985) and *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971). The defendant's assertion is incorrect.

Citing *Thirty-seven Photographs*, 402 U.S. at 376, the defendant maintains that "the Supreme Court has been careful to predicate its assertions about the reasonableness of seizures upon some prior recognition of illegality or contraband." (Pet. 7.) He also notes that in *Cardona*, "this Court . . . affirmed suppression of checks photocopied during the search as an 'illegal seizure' because the checks were not known to be contraband when they were copied." (Pet. 7.) The panel opinion here, however, does not conflict with the holdings in these cases. The defendant's laptop here was merely detained while it was being searched by Customs for entry into the United States. In fact, in *Cardona*, this Court found that the agent's detention of the photocopies *after* the border search was complete was unlawful; it did not suggest that it was improper for the agent to detain the contents of the package while the border search was still occurring, nor did it suppress the agent's observations made during the search. 769 F.2d at 629.

Although he does not explicitly say so, the defendant seems to suggest that the majority's opinion conflicts with *United States v. Sahanaja*, 430 F.3d 1049 (9th Cir. 2005) and *United States v. Whiting*, 781 F.2d 692 (9th Cir. 1986). (Pet. 5.) He asserts that "if continuous government control of an item *ipso facto* resolved the

issue, this Court could have invoked that" in *Sahanaja* and *Whiting*, but "did not do so." *Id.* The defendant's analysis is incorrect, but in any event, the facts in *Sahanaja* and *Whiting* are not analogous to this case. First, *Sahanaja* involved an item that was searched *after* it had been cleared by Customs, not before. *Sahanaja*, 430 F.3d at 1051-52. Here, the officers never cleared the defendant's laptop from Customs, and the defendant was aware that the border search remained ongoing. Second, *Whiting* involved a non-Customs search that occurred before a package reached the border. *Whiting*, 781 F.2d at 693-95. It was not a routine border search by Customs agents, but instead was a pre-border search conducted by a non-Customs agent for purposes of furthering a criminal investigation. *Id.* The panel correctly determined that the search here was a lawful border search, and the opinion does not conflict with Supreme Court or Ninth Circuit precedent.

Nor does the opinion conflict with other circuit precedent. The defendant argues that the opinion conflicts with *Kam-Almaz v. United States*, 96 Fed.Cl. 84 (Fed.Cl. 2011), because "the Federal Claims Court explicitly found that property seizures at the border are unjustified absent 'reasonable cause to suspect a violation of law.'" (Pet. 8, citing *Kam-Almaz,* 96 Fed.Cl. at 89.) However, *Kam-Almaz* involved a civil complaint filed by an international traveler who claimed that his computer was damaged while in the possession of Customs. 96 Fed.Cl. at 86-87.

Although the court did observe that the seizure of the plaintiff's computer would have been unlawful and unauthorized if the agent did not have "reasonable cause" to believe that a violation of the law occurred, this holding was based on a federal regulation, 19 C.F.R. § 162.21, and was not a Fourth Amendment holding. *Id.* at 89. The court went on to note that it "does not have jurisdiction to hear claims contesting the lawfulness of a search and seizure because due process and Fourth Amendment claims are reserved to the District Court." *Id.* Thus, *Kam-Almaz* is inapposite.

The defendant and the amici spend much time in their briefs arguing that the border search exception is unconstitutional and how the suspicionless search of a computer and other electronics during a routine border search violates the Fourth Amendment. (Pet. 1, 6, 10-11, and 18-19; Amicus Brief, The Constitution Project 3-5, 6-12; Amicus Brief, NACDL 5-9, 11-16.) They assert that electronic media is "qualitatively different" from other property due to the type and volume of information they can contain. (Amicus Brief, The Constitution Project 3.) However, these points merely rehash arguments already rejected by this Court in *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008) (petition for rehearing en banc denied on July 10, 2008), *cert. denied*, 129 S.Ct. 1312 (2009) (holding "that reasonable

suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border").[3]

The panel opinion does not expand the border search exception, as suggested by the defendant. (Pet. 11-12.) Rather, the majority correctly found that the search here was a lawful border search, a conclusion consistent with Supreme Court and Ninth Circuit precedent. *See also Cotterman*, 637 F.3d at 1074-75 (citing *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004), and other cases). (*See also* Op. Br. 15-41; Rep. Br. 3-24) (providing analysis and discussing cases).

B. THE PANEL OPINION WAS CORRECTLY DECIDED.

1. The Panel Correctly Recognized That There Was a Single Border Search and Detention That Required No Reasonable Suspicion.

Not only is the panel opinion consistent with Supreme Court and circuit precedent, but it was correctly decided. The defendant has failed to show that the panel wrongly decided an issue of exceptional importance. Fed. R. App. P. 35.

In his petition, the defendant focuses most of his argument on the idea that his laptop was unlawfully "seized" without suspicion. (Pet. 4-11, 18-19.) This argument, however, is incorrect and was properly rejected by the panel.

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[3] The defendant did not argue to the panel, nor does he argue here, that *Arnold* was wrongly decided, and such an argument would not be preserved. In any event, *Arnold* was correctly decided, and the panel opinion correctly relies on *Arnold* and is not in conflict with it.

The defendant argues that the government conducted two separate border searches, one at the POE and one in Tucson, separated by a suspicionless "seizure" of the defendant's laptop. (Pet. 4, 6.) This characterization of the search of the defendant's laptop is incorrect. As noted by the panel opinion, the forensic analyst's examination of Cotterman's laptop was simply a continuation of the lawful border search initiated at the border and did not implicate any heightened expectation of privacy. *Cotterman*, 637 F.3d at 1077-79.[4]

The opinion correctly notes that the detention of the defendant's laptop without reasonable suspicion for further inspection was allowed. *Id.* at 1076 n.9 (also citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). As this Court has already held, no particularized suspicion is required to search a laptop during a border search. *Arnold*, 533 F.3d at 1008; *Cotterman*, 637 F.3d at 1083 (same, citing *Arnold* and *Montoya de Hernandez*).[5] The defendant's laptop was simply detained

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[4] The search of the defendant's laptop was not an extended border search, because the laptop was not cleared by Customs to enter the United States before it was searched. (*See* Op. Br. 34-41; Rep. Br. 8-15) (presenting a complete analysis of this issue); *see also Cotterman*, 637 F.3d at 1076-79 (citing cases).

[5] The majority properly rejected the dissent's suggestion that computer forensic searches should always require reasonable suspicion. *See, e.g., Cotterman*, 637 F.3d at 1084 (dissent) ("The problem is that the government seized Cotterman's laptop so it could conduct a computer forensic search, a time consuming and tremendously invasive process, without any particularized suspicion whatsoever."); *id.* at 1086 (continued...)

for the duration of the lawful border search initiated at the border. Indeed, the defendant does not contest the legality of conducting a suspicionless detention of property to conduct a border search. He states that travelers expect to have their personal possessions detained or "seized" while a "thorough border search" is conducted. (Pet. 6.) He asserts, however, that once his laptop was taken to Tucson for further inspection, the once lawful detention of his property became an unlawful "seizure," suggesting that the difference between a lawful detention of property incident to a border search and an unlawful suspicionless seizure is governed by the amount of distance at the time of the search.

However, as the panel correctly ruled based on circuit and Supreme Court authority, time and distance do not determine the character of a border search. *Cotterman*, 637 F.3d at 1076-78 (citing cases); *see also id.* at 1076 ("Cotterman himself concedes, albeit reluctantly, that had the Government elected to transport its personnel and specialized computer forensic equipment to the border to perform its

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[5](...continued)
(dissent) ("Given the exhaustive nature of computer forensic searches, I would hold that such searches are conducted in a particularly offensive manner unless they are guided by an officer's reasonable suspicion that the computer contains evidence of a *particular* crime.") (emphasis in original; internal quotations omitted). *See also id.* at 1080, 1083, and n. 14 (majority opinion) (rejecting notion that reasonable suspicion is required to conduct computer forensic examination during border search); *id*. at 1084 n. 18 (majority opinion) (noting that dissent's arguments are foreclosed by *Flores-Montano* and *Arnold*).

search, the border search doctrine would likely have applied. The sticking point is whether the inherent power of the Government to subject incoming travelers to inspection before entry also permits the Government to transport property not yet cleared for entry away from the border to complete its search. Cotterman claims that it does not. We cannot agree."). The panel correctly concluded that Customs conducted one lawful continuous border search of that item, not "two searches" requiring separate justification, as the defendant contends. *Cotterman*, 637 F.3d at 1079, 1083-1084.

2. The Panel Correctly Found That the Search Was Reasonable.

The panel correctly concluded, as did the district court, that the search was reasonable under the Fourth Amendment. *Cotterman*, 637 F.3d at 1080-84; ER 8, 10. The defendant argues that the majority failed to fully analyze the "reasonableness" of the search by focusing only on the "manner" in which it was conducted. (Pet. 12.) This argument is misplaced because the opinion fully analyzed whether the agents acted reasonably in conducting the search. *Cotterman*, 637 F.3d at 1079-84.

Border searches by their very nature are reasonable under the Fourth Amendment, and, as noted above, require neither a warrant, probable cause, nor articulable suspicion. *Montoya de Hernandez,* 473 U.S. at 538; *United States v. Ramsey,* 431 U.S. 606, 616-18 (1977). The reasonableness of a search depends on

the facts and circumstances of the particular search. *Montoya de Hernandez*, 473 U.S. at 537. Courts must balance any intrusion resulting from the search with the legitimate governmental interest to determine reasonableness under the Fourth Amendment. *Id.* at 544.

The defendant is essentially asking this Court to ignore the district court's factual finding below, correctly adopted by the panel, that the Department of Homeland Security acted reasonably in conducting the search. (ER 8, 10); *Cotterman*, 637 F.3d at 1083. The search was neither destructive nor offensive, as the panel found. *Cotterman*,637 F.3d at 1080-83 (citing cases). The panel also noted that the timing of the search was not unreasonable. *Id.* at 1082-83. Indeed, the forensic examiner worked with reasonable dispatch, over the weekend, to complete the search and found the child pornography within forty-eight hours. The computer forensic search was not "indefinite" nor unreasonable (Pet. 4); rather, it was completed very quickly, as the panel found, particularly when compared to the typical forensic search, as Owen noted. (ER 127); *see also Cotterman*, 637 F.3d at 1082-83. The panel correctly observed:

> [T]he Supreme Court has recognized that the through search of property under the border search power does not implicate an individual's privacy expectation – even if the individual cannot depart from the border without that property. . . . Quite to the contrary, the Court has indicated that travelers should expect intrusions and delay in order to

> satisfy the Government's sovereign interest in protecting our borders. . . ."

Cotterman, 637 F.3d at 1078 (citations omitted). Customs acted reasonably in detaining the *property* for further review, but letting the Cottermans leave the POE. Indeed, the defendant's suggested alternative – i.e., that Customs should have kept the Cottermans at the border for days while it conducted a forensic analysis of the laptops and camera at the border – is actually less reasonable.[6]

The defendant and amici suggest that en banc review should be granted because the opinion could have undesirable ramifications in other cases by allowing for indefinite seizures and searches of property at the border. However, this claim overlooks the majority's clear statement that it is not authorizing "*indefinite deprivations*" and that the result could change in the future if the circumstances were altered. *Cotterman*, 637 F.3d at 1079 n.13 (emphasis in original). Indeed, the opinion specifically states that the government does not have carte blanche:

> We by no means suggest that the Government has carte blanche at the border to do as it pleases absent any regard for the Fourth Amendment. . . . Rather, we continue to analyze the Government's conduct on a case-by-case basis to determine whether searches or

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[6] The panel made the same observation. *Cotterman*, 637 F.3d at 1083 ("[O]ur common sense and experience inform us that the decision to transport the property to the laboratory, instead of transporting the laboratory to the property, resulted in a shorter deprivation."); *id*. at n. 17 (noting that transporting the laboratory to the property would also have inconvenienced the Cottermans).

> seizures are effectuated in such a manner as to render them unreasonable.

Id. at 1079 (internal citation omitted). The majority's decision was appropriately limited to the facts. *Id.* at 1079 n.13. Thus, the opinion is not the sweeping decision that the defendant makes it out to be in order to try to justify en banc review.

The defendant also encourages this Court to adopt rules not required by the border search doctrine or the Fourth Amendment. For example, he encourages this Court to adopt a rule "requiring a traveler to cooperate by providing unencrypted data or passwords," but this simply is not reasonable or mandated by the Fourth Amendment.[7]

The defendant's various arguments were properly rejected by the panel because the search of his laptop was a lawfully-conducted border search. The panel also correctly recognized that travelers do not have a constitutionally protected expectation that their property will not be removed from the border, and that adopting the defendant's position would severely hamper the government's ability to fulfill its duty to protect the borders of the United States, particularly where an item may require further testing or examination to ascertain its contents:

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[7] This proposal is similar to one the defendant suggested to the panel, namely, that the government should be required to request and accept offers of assistance by travelers during routine border searches of their property. (Ans. Br. 57-58.) The panel properly rejected the defendant's invitation. *Cotterman*, 637 F.3d at 1080.

> [W]e reach the very heart of Cotterman's claim: that travelers somehow have a constitutionally protected expectation that their property will not be removed from the border for search and, therefore, the Government must either staff every POE with the equipment and personnel needed to fully search all incoming property or otherwise be forced to blindly shut its eyes and hope for the best absent some particularized suspicion. We find this position simply untenable.

Cotterman, 637 F.3d at 1077; *see also* Op. Br. 42-46 (discussing issue). The panel correctly determined that a proper border search had been conducted in this case and that no reasonable suspicion was required. *Cotterman*, 637 F.3d at 1083.

VI. CONCLUSION

The panel opinion was correctly decided and is consistent with decisions from the Supreme Court, this Court, and other circuits. For the foregoing reasons, the government respectfully asks this Court to deny the defendant's petition for en banc rehearing.

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Assistant U.S. Attorney

VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 35-4 AND 40-1 FOR CASE NO. 09-10139

I certify that pursuant to Circuit Rule 40-1, the attached response to petition for rehearing en banc is: (check applicable option)

__X__ Proportionately spaced, has a typeface of 14 points or more and contains 4028 words (petitions and answers must not exceed 4,200 words).

or

___ Monospaced, has 10.5 or fewer characters per inch and contains _____words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

___ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

November 14, 2011
Date

s/ Carmen F. Corbin
Signature of Attorney

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2011, I electronically filed the Appellant's Response to Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. William J. Kirchner, Esq., counsel for defendant-appellant, and other participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Carmen F. Corbin
CARMEN F. CORBIN
Assistant U.S. Attorney